

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 DHI GROUP, INC., ET AL § CASE NO. 4:16-CV-01670
§ HOUSTON, TEXAS
5 VERSUS § TUESDAY,
§ MARCH 20, 2018
6 KENT, JR., ET AL § 11:02 A.M. TO 11:53 A.M.

7
8 MOTIONS HEARING

9 BEFORE THE HONORABLE NANCY K. JOHNSON
UNITED STATES MAGISTRATE JUDGE

10
11 APPEARANCES:

12 FOR THE PARTIES: SEE NEXT PAGE

13 COURT RECORDER: DESIREE SILLAS

14
15
16
17
18
19
20 TRANSCRIPTION SERVICE BY:

21 JUDICIAL TRANSCRIBERS OF TEXAS, LLC
935 ELDRIDGE ROAD, #144
22 SUGAR LAND, TEXAS 77478
Tel: 281-277-5325 ▼ Fax: 281-277-0946
23 www.judicialtranscribers.com

24 Proceedings recorded by electronic sound recording;
25 transcript produced by transcription service.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

FOR THE PLAINTIFF:

BAKER BOTTS LLP
Amir Halevy, Esq.
910 Louisiana
One Shell Plaza
Houston, TX 77002

JORDAN LYNCH & CANCIENNE
Walter G. Lynch, Esq.
1330 Post Oak Blvd.
Suite 2575
Houston, TX 77056

JORDAN LYNCH & CANCIENNE
Joseph W. Golinkin, II Esq.
1980 Post Oak Blvd.
Suite 2300
Houston, TX 77056

FOR THE DEFENDANT:

GARDERE WYNNE SEWELL LLP
James G. Munisteri, Esq.
1000 Louisiana
Suite 2000
Houston, TX 77002-5007

1 HOUSTON, TEXAS; TUESDAY, MARCH 20, 2018; 11:02 A.M.

2 THE COURT: All right. Good morning.

3 ALL: Good morning Judge.

4 THE COURT: All right, be seated. All right, I
5 think it's back like a bad penny.

6 All right, who's representing the Plaintiffs?

7 MR. LYNCH: Your Honor, Walter Lynch on behalf of
8 the Plaintiffs. I have Jeff with me and Amir Halevy.

9 THE COURT: All right. And Mr. Munisteri. It
10 looks like some things have been resolved.

11 MR. MUNISTERI: True, Your Honor.

12 THE COURT: Okay. So, Mr. Munisteri, what are you
13 still concerned about?

14 MR. MUNISTERI: So, on the motion the first fire
15 is the request that concerns damages and evaluation by third
16 parties in the sales process during the last year and a half
17 by Rickton (phonetic).

18 And then the requests are, in particular, 135
19 through 138.

20 THE COURT: But 135 through 138 aren't addressed
21 to damages at all.

22 MR. MUNISTERI: Well, they are in this sense.

23 THE COURT: Well I read them and your -- they seem
24 very off point.

25 MR. MUNISTERI: They're exactly on point, Your

1 Honor. The Court will remember the Court's comment at the
2 last hearing and maybe even at the hearing before that the
3 Court properly observed that the two parties have very
4 different views about how you value damages, if any, in
5 terms of methodology.

6 And in essence, as the Court knows, our view is
7 that cash flow is how you value a business. And it's
8 customers, customer's contracts, and cash in that when you
9 value --

10 THE COURT: That's your view now. Because when
11 you were selling the company, did you value it on cash flow?

12 MR. MUNISTERI: We didn't buy it.

13 THE COURT: When they bought it from you?

14 MR. MUNISTERI: Yes. There's a short --

15 THE COURT: When Kent, the company, he valued the
16 company based on?

17 MR. MUNISTERI: And the short answer is yes. And
18 we're in a court proceeding --

19 THE COURT: Yes, he based it on cash flow?

20 MR. MUNISTERI: Yes.

21 THE COURT: Okay.

22 MR. MUNISTERI: I mean, there are other dynamics
23 and attributes to the business as there are with any
24 business. But the issue in this case are the -- \$20 million
25 claimed by the Plaintiff.

1 They calculate that on a method by taking, as the
2 Court knows, the total value -- market value of the
3 company -- and dividing into that amount the number of
4 members that they think -- it's an incorrect number -- but
5 that they claim converted into oil for members. That's
6 their methodology.

7 As the Court said at the last hearing, two
8 different views. The very best way for the Court and the
9 gatekeeper and the jury, if it gets past the gatekeeper, to
10 test that theory. If what the actual buyers do when they
11 look to buy Rigzone in the last year and a half.

12 And the other thing, remember, is it's not just
13 Rigzone that they're buying, it's also Rigzone and OilPro --
14 which was a May 2014 acquisition that was somewhat
15 transformative.

16 So the method by which the other parties value, as
17 well as the consultant that Rigzone hired value -- the
18 methodology is directly relevant to answering the question
19 of whether when someone looks at Rigzone, do they actually
20 in reality -- not an expert witness that's hired, you know,
21 a professor of finance who's never done this before who
22 doesn't have anything to do with the social media industry
23 -- like their expert.

24 But in actual reality, when somebody's got to cut
25 a check, how do they value this business? And so any of

1 the -- the identity of the people that bid, the amount they
2 bid, and then obviously their records on how they calculated
3 their bids.

4 THE COURT: But your questions -- and maybe I'm
5 not looking at the right request for production, but you're
6 looking at 135 to 138; 135 asks you to produce all email
7 attachments sent to, from or copying one or more of the
8 Defendants from a particular period of time. It refers to
9 Rigzone and these -- I mean, you're scooping up a zillion
10 documents.

11 MR. MUNISTERI: Well that may be a different
12 request because --

13 THE COURT: All right, then maybe I'm not looking
14 at the right one. So can you hand me the right ones?

15 MR. LYNCH: Well, I've got a chart of the ones I
16 think that may still -- some of these may have been
17 resolved, but these are the ones that the original motion
18 were on.

19 THE COURT: I thought we were talking about 135 to
20 138 for the alleged damaged questions.

21 MR. LYNCH: Yes.

22 MR. MUNISTERI: Your Honor, here's what the
23 request, -- if I may?

24 THE COURT: Sure.

25 MR. LYNCH: And this may be useful at some point.

1 THE COURT: Okay, this is not what I'm looking
2 for. All right.

3 (Pause in the proceedings.)

4 THE COURT: All right, so Mr. Lynch, did Rigzone
5 -- were you trying to get divest yourself of Rigzone in
6 2017?

7 MR. LYNCH: There were -- yeah, there were
8 discussions.

9 THE COURT: There were discussions?

10 MR. LYNCH: Yeah, but what happened in 2017,
11 different market conditions unrelated to the time in
12 question when the values are really, you know, the damage
13 models want to be looked at. It's really apples and
14 oranges.

15 I mean, yes, there was -- there is some
16 information there. I just don't see how it relates to what
17 was going on two years before --

18 THE COURT: Was the method different?

19 MR. LYNCH: I can't say that it is or it isn't. I
20 don't know for sure. I don't know that it would matter
21 because it's a different -- it's valuing a different thing
22 at a different time.

23 (Pause in the proceedings.)

24 THE COURT: All right. So I think that how you
25 value a company like this is relevant. So you will turn

1 over evidence, documents relating to how it is valued. That
2 does not mean -- and I'm not sure what the limits of this
3 should be, but you don't get all communications. You just
4 get valuation information. How they're valuing --

5 MR. LYNCH: And Your Honor,

6 THE COURT: -- how you are valuing it.

7 MR. LYNCH: How Rigzone was valuing it?

8 THE COURT: Exactly.

9 MR. LYNCH: Okay.

10 THE COURT: Yes.

11 MR. MUNISTERI: How the third parties in a fair
12 market value with willing buyer, willing seller. Willing
13 buyer values. It is important. Their offer letters. And
14 that's really all I need is to identify these people who
15 made the offers or declined offers, and what they offered,
16 and then I'll make a decision whether to subpoena their
17 records. But the Court to remember -- because I know the
18 Court has cases -- the Plaintiffs subpoenaed records from
19 potential purchasers of --

20 THE COURT: This is what I'm concerned about,
21 Mr. Munisteri. I think it -- you know, we all value things
22 differently and that's -- you know, I may think my house is
23 worth, you know, a zillion dollars, but maybe a fair market
24 value person would not think that. Okay?

25 If I -- you're trying to impeach my valuation, it

1 would be impeaching me to -- if I've ever in the past said
2 my house was not worth a zillion dollars, it was worth a
3 half a zillion dollars.

4 What I'm concerned about is when we're valuing
5 things in the marketplace it may not be wholly relevant what
6 someone else thinks my property is worth, okay?

7 MR. MUNISTERI: It's completely relevant. Fair
8 market value is tested by what a willing buyer, willing
9 seller under normal market circumstances will offer.

10 So we have in this case the sort of evidence that
11 is very unique. You have a Plaintiff that says, here's how
12 you value it, and you've got people who have valued it --

13 THE COURT: You only have fair market value if you
14 have a transaction. If you don't have a consummated
15 transaction, you've got the seller's view of what it's worth
16 and the buyer's view of what it's worth.

17 MR. MUNISTERI: And that's very relevant.

18 THE COURT: So, it's not relevant. Because buyers
19 can say -- sellers can over value and buyers can underbid.
20 It's a bargaining process.

21 MR. MUNISTERI: But if he --

22 THE COURT: You don't have a meeting of the minds
23 until you have a transaction where they both agree what the
24 fair market value is. That's my concern.

25 You don't -- because you're going to get in to

1 motivations of a third party who is -- may be undercutting
2 the market and you want to use that without -- and then
3 we've got a collateral issue on what were they thinking?
4 What was their motivation? Was it really a bonafide offer
5 for value, or is this just a low ball that's ridiculous?

6 MR. MUNISTERI: So, Your Honor, there are some
7 things that the Court doesn't know just because it's not
8 come before the Court.

9 THE COURT: Right.

10 MR. MUNISTERI: But the Court has a number of
11 times -- like a lot of judges, indicated that sort of what's
12 good for one side is good for the other.

13 Part of their damage model is based not on what
14 OilPro thought it was worth, but what a third party whom
15 they subpoenaed thought it was worth and how they valued it.

16 So a critical part of their damage model is
17 exactly the type of evidence that you're saying is not
18 relevant. And so when I come to a jury -- and as I've said
19 I think I should come to you first as the gatekeeper -- I
20 need to be able to say that in the same way that they have,
21 that when a person actually put money on the table, here is
22 how they valued the company. They valued it based on cash
23 flow.

24 And so for there to be -- and I don't know the
25 answer -- but for there to be five companies that were

1 solicited and made offers -- not just valued it differently
2 in accordance with how I think damages are valued when you
3 value a company -- but also may not have even offered
4 anywhere close to the damages they claim.

5 They claim \$20 million of damages for a company
6 that basically doesn't even cash flow positive because of
7 the oil prices which preceded these events.

8 So they put my client in the position to defend a
9 case where they are relying on third party data -- the
10 method and the forecasts. But I can't look at third party
11 data. It's unfair.

12 It's also the -- when someone -- take the Court's
13 example about the house. You have a view about your house
14 value. The seller -- the buyer has a view about the house
15 value. But generally how that's regarded is how have people
16 in other transactions with similar homes, what have they
17 paid? So you look at comps.

18 What's remarkable about this case is you actually
19 have evidence of comps or how people have valued for the
20 very same company, for the same house.

21 THE COURT: I don't have a problem with comps.
22 What I have a problem with is an offer that, you know, is
23 subject to negotiations. That is not a comp. A comp is --

24 MR. MUNISTERI: Well, the jury should be able to
25 consider whether someone went through due diligence and

1 offered -- let's just say \$2 million -- 10 percent of their
2 damage claim, but for the whole company.

3 The jury is entitled to know reality. I mean,
4 I've often said, Your Honor, that we live in sort of a
5 strange profession where the jurors are asked to make
6 decisions based on the evidence that's introduced through
7 the witnesses in sort of a courtroom rambling.

8 But our job -- Mr. Lynch's job, my job, even the
9 Court's job to some extent -- but the advocate's job is to
10 make sure we give them as much of reality as we can.

11 To rely on a forecast which they have from a third
12 party, but not allow me to come in and say when they try to
13 sell the company -- not a single company, not a single
14 company used the method that their expert used. And not a
15 single company even offered anywhere close to what they
16 claim in damages, is incredibly relevant.

17 And it ties both hands behind my back to not be
18 able to argue that, particularly in a case where damages is
19 the issue.

20 THE COURT: Mr. Lynch?

21 MR. LYNCH: Yeah, I'm concerned that I'm confused
22 about the reference to prior evaluation and experts. What I
23 understand is there was a prior evaluation of OilPro by an
24 interested purchaser that invested money actually into the
25 company and created a valuation.

1 And through that process they used some of the
2 metrics that our expert uses to do the valuations in the
3 expert's report. That was a consummated transaction. And I
4 think you're then comparing apples and oranges like Your
5 Honor suggested when you actually have something that went
6 through where there was a \$20 million valuation of OilPro by
7 \$3 million investment -- 15 percent. And then now, two and
8 a half years later, people bidding on it or maybe trying to
9 get a good deal when somebody wants to get out of the
10 business. Those aren't the same thing.

11 And so I'm confused as to -- we're trying to make
12 an argument to say that there is -- something our expert
13 used was a transaction or a proposed transaction -- well
14 that was consummated. That just, as Your Honor suggested,
15 that's the ones that matter because we actually have a
16 meeting of the minds.

17 THE COURT: I'm just concerned with putting out
18 numbers where we're going down a twisty little road on what
19 motivated that offer.

20 MR. MUNISTERI: Well, what he just said gets into
21 that. So, he's going to rely on what motivated
22 Mr. Fairbanks and --

23 THE COURT: I thought Mr. Lynch was talking a
24 consummated transaction, not an offer.

25 MR. MUNISTERI: And he's going to -- consummated

1 or not, that gentlemen, Mr. Fairbanks, will be subject to
2 cross-examination about what motivated him.

3 THE COURT: Of course.

4 MR. MUNISTERI: And so all of the -- and they have
5 a consummated transaction, too, --

6 THE COURT: But, --

7 MR. MUNISTERI: -- and they also have -- because
8 they do. They sold part of Rigzone to one party that's
9 publicly announced and they've received bids from multiple
10 parties for the rest of Rigzone, but they've not consummated
11 them.

12 And to give the, you know, to -- ultimately if
13 you're making a damage claim, as they are, on the value of
14 the business -- which for lots of reasons I don't think is
15 proper, but that's where we are.

16 And if you're basing it on a methodology that I
17 can't find any literature for, other than an article in
18 *Forbes* by someone who's not a damage valuation expert, which
19 is what they based it on -- then I should be able to basis
20 on the type of information that a real expert evaluation
21 would look to, which are either actual offers, actual -- or
22 actual transactions.

23 I thought, Your Honor, about spending the time
24 yesterday to get an affidavit from one or both of our expert
25 witnesses to help the Court and put in the record how -- for

1 them to prepare their rebuttal expert reports they want to
2 see in it as a damage evaluation expert it is relevant for
3 them to consider both consummated and offers transactions.

4 I didn't think it'd be necessary. I'm happy to
5 supplement the record, both --

6 THE COURT: I think you need to. I'm very
7 concerned about just how far a field we are going when
8 Mr. Lynch will have to be impeaching, you know, whether an
9 offer is bonafide or not.

10 Because, I mean --

11 MR. MUNISTERI: I'm going to have to do the same
12 with Mr. Fairbanks. So I'm happy to submit a supplement and
13 move to the next issue.

14 THE COURT: All right, let's move to the next
15 issue.

16 MR. MUNISTERI: This is an important issue and
17 I'll --

18 THE COURT: I know it's important. I'm just
19 concerned that, you know, when you start throwing numbers
20 around to a jury and you give legitimacy to maybe an offer
21 that was just kind of like a flyer. It wasn't real. It
22 wasn't a bonafide offer.

23 It was just kind of a low ball and the jury is
24 supposed to, kind of, give credence to a low ball offer.
25 And I don't think that Judge Miller wants to go and have

1 Mr. Lynch call all these offers and say were you just making
2 low ball, you know, kind of -- you'd have to find that out
3 what their motivation was. Why did you think this was, you
4 know, this company was worth \$2 million? And they're just
5 like, well, that's all we wanted to pay for it.

6 Well that's just stupid. You know, it may not
7 be --

8 MR. MUNISTERI: Well if that's all they say,
9 that's all they say. But I suspect that when we get down to
10 it, they're going to say we did a -- we ran the numbers and
11 here's what we found with the earnings from this company
12 EBITDA and here's how we brought in the forecasts.

13 And that's the very sort of information --

14 THE COURT: I will be happy to consider your
15 expert's affidavit. You then tell me, you know, why you
16 think that, you know, that's unreliable and no one can
17 listen to it.

18 MR. MUNISTERI: Understood.

19 THE COURT: All right.

20 MR. LYNCH: And we've already been ordered to
21 produce how it was valued by Rigzone.

22 THE COURT: Yes.

23 MR. LYNCH: So we'll move forward with that --

24 THE COURT: Yeah, I mean, you can be impeached on
25 how you value inconsistencies within --

1 MR. LYNCH: Right.

2 THE COURT: -- your own valuation of your company.

3 MR. MUNISTERI: And Your Honor, does that -- let I
4 mean add a little. Does that include their consultants?
5 Because they hired someone to run the auction process.
6 Someone that they hired --

7 THE COURT: Yes, I mean, their consultants are
8 them. I mean, that's how they are valuating the company.

9 MR. MUNISTERI: Is this Friday sufficient, Your
10 Honor?

11 THE COURT: This Friday?

12 MR. MUNISTERI: For the supplement.

13 THE COURT: If you can get it in by that time.

14 MR. MUNISTERI: I can.

15 THE COURT: Okay. So what's the next dispute?

16 MR. MUNISTERI: I think the next issue is
17 Request 26 which are basically what steps were taken by DHI
18 to access and scrape OilPro's website. And the issue there
19 is that they've not withdrawn their objection. I don't
20 know --

21 THE COURT: I thought they were going to produce
22 26.

23 MR. LYNCH: We are.

24 MR. MUNISTERI: But they've not withdrawn subject
25 to the objections. And if they are, then that's fine.

1 THE COURT: What were the objections?

2 MR. LYNCH: It's overbroad, but we're going to
3 produce. We're going to our best to produce and produce
4 responsive documents. I think that one is --

5 THE COURT: All right. I haven't really heard how
6 it's overbroad so I'm going to overrule the overbroad
7 objection. Produce what you've got, see where we go.

8 What else, Mr. Munisteri?

9 MR. MUNISTERI: The next two categories deal with
10 the other companies whose websites were scraped. And the
11 relevance of this is that the core of their defense -- and
12 it's really the only defense they have in this case -- is on
13 the breach of contract claim in particular of the counter
14 claim.

15 Their defense is that they did not assent to the
16 terms of conditions. And the CEO has said in his testimony
17 that there's someone who's supposed to review all the terms
18 and conditions before they scrape a website. The individual
19 who's a corporate rep, sort of said differently. We don't
20 look at them.

21 We'd like to see the corporate practice that they
22 have, which is, first of all with one particular example
23 LinkedIn. We know there is a demand letter and a response.
24 In discussions last week, I offered to limit the request to
25 just the actual letter from LinkedIn and their response.

1 There's some testimony about it.

2 My understanding from Mr. Lynch was that he was
3 going to consult with his client and I didn't hear back. So
4 that's --

5 THE COURT: So you're saying that Mr. Lynch's
6 client scraped LinkedIn?

7 MR. MUNISTERI: They did.

8 THE COURT: Okay.

9 MR. MUNISTERI: And then LinkedIn sent the letter
10 saying we believe, based on the testimony, that this is in
11 violation of our terms and conditions that say you cannot
12 access our website through automated means. That's the type
13 of software which they used to access OilPro's website.

14 And there's apparently a response letter and then
15 they ceased scraping LinkedIn site. I've not asked for any
16 other -- any documents other than the letter with respect to
17 LinkedIn, the letter and the response.

18 And then there are other sites. There's like a
19 couple hundred sites that they scraped. And my theory, in
20 part, will be based on their commercial practice of their
21 knowledge of the other site's terms and conditions and the
22 prohibition that's really typical in these sites against
23 automated means of scraping and any discussion they have of
24 those terms and conditions because the CEO said they're
25 supposed to look at it.

1 THE COURT: Okay. Mr. Lynch?

2 MR. LYNCH: I'm worried this is going to become a
3 sideshow of no direct relevance to this case. What
4 LinkedIn's position is on scraping or collecting
5 data -- publicly available data I -- is really not relevant
6 to parties at issue here.

7 Just because we had a dispute with them about what
8 we were doing and that they thought that we were in
9 violation of the law. You know, I just fear that that
10 becomes way too powerful and an anchor for the jury to
11 decide the issues on something other than what's before you.

12 THE COURT: Right, I think Mr. Lynch you're going
13 to have to make that argument in an *in limine* motion. I
14 think it's marginally relevant. I think the scraping of
15 public website is a little different than what the
16 Defendants did to you, but that will be up to Judge Miller.

17 MR. LYNCH: And so I understood from the reply
18 that -- well just to make sure I understand -- the letter
19 and the response and that takes care of this or are we going
20 to just start having to look for any other complaint by
21 anybody?

22 THE COURT: No, I think the letters and the
23 response is fine. I mean, the demand letters -- when you're
24 doing it, you need to turn that over.

25 MR. LYNCH: Understood.

1 MR. MUNISTERI: 449 deals with the identification
2 and the -- well actually with the other request -- deal with
3 scraping other websites and what they did before scraping
4 the websites. Did they do what the CEO said -- which is
5 someone is supposed to review the terms and conditions?

6 And that evidence would be a commercial practice
7 that would be probative and indicative if they reviewed the
8 terms and conditions of OilPro site.

9 THE COURT: This is a request for production. So
10 the only thing you're going to pull on that is if they've
11 got some policy on it, right?

12 MR. MUNISTERI: Or some -- or some document that
13 relates to that particular site.

14 THE COURT: And what do you think that would be?

15 MR. MUNISTERI: I think it would either be --

16 THE COURT: I'm not going to make -- I'm not going
17 to make them search their entire files for any mention of
18 LinkedIn or anything else. It's got to be related to
19 scraping and their policy of looking at the terms and
20 conditions, so.

21 MR. MUNISTERI: I don't know their documents, Your
22 Honor, but certainly documents regarding the sites they
23 scrapped; the evidence that they reviewed the terms are
24 relevant.

25 I mean, I don't know if they have a form that goes

1 to that. I don't know if it's an email. I don't know their
2 documents.

3 THE COURT: Normally you just check the box when
4 you're on the website. I mean, I'm not sure what documents
5 we're talking about.

6 MR. MUNISTERI: Well, so the documents would be
7 any internal documents about what -- every time they go
8 scrape information from a website, it's more than just
9 accessing them. So they've got to set up accounts to go
10 through anonymous IP addresses so that the website doesn't
11 recognize that they're being scrapped.

12 So there'll be a lot of steps for, I mean, pick a
13 website, Monster.com. For them to set up on Monster.com to
14 scrape it, they're not just getting on the website. They're
15 doing more. They're setting up anonymous IP addresses so
16 they're not detected. And there should be, according to the
17 CEO, a review of the terms and conditions of the Monster.com
18 website.

19 THE COURT: Mr. Lynch?

20 MR. LYNCH: So I think -- and I thought he said 49
21 and 49 is one that we said we were going to produce.

22 THE COURT: Right.

23 MR. LYNCH: So I'm not really sure --

24 MR. MUNISTERI: No, I misspoke, I believe, Your
25 Honor. It's within 40, 42, 45, 50, 58, 59, 60, 61 --

1 MR. LYNCH: Okay, all right.

2 THE COURT: Okay.

3 MR. LYNCH: So I think by doing the search for the
4 scraping documents -- which we're going to do --

5 THE COURT: Okay.

6 MR. LYNCH: -- that would subsume a request for
7 policies and procedures about checking terms and conditions
8 about when you're scraping.

9 So I don't know that there's a separate search
10 that needs to be done. I don't -- I think it should be
11 captured in that search, what he's asking because what the
12 CEO did say is that it should be done.

13 THE COURT: Okay.

14 MR. LYNCH: Whether it was or it wasn't, he wasn't
15 really commenting on that. He said he thought it should be
16 done. And so by us producing the documents related to
17 scraping, that should subsume it.

18 MR. MUNISTERI: And just to give the Court some
19 background. If the group --

20 THE COURT: No, I think he's right. I think it
21 should come up with -- it's going to be in the search terms.

22 MR. MUNISTERI: And that's what I was --

23 THE COURT: So, you're going to get it.

24 MR. MUNISTERI: -- give the Court some background.
25 The number of custodians in this with respect to these

1 searches is relatively limited. It's a small group. It's
2 three or four at most.

3 So I agree that the search terms should do it.
4 It's not a lot of expense.

5 THE COURT: Okay, all right. So it sounds like
6 we're in agreement.

7 What else Mr. Munisteri?

8 MR. LYNCH: Vigorous agreement.

9 MR. MUNISTERI: I mean, I think 49 is actually,
10 probably even more relevant because it's the same type
11 documents, but it's specific to OilPro. And --

12 THE COURT: Well they said they're going to run
13 search terms on that. So, 49 you've got an agreement on.

14 MR. MUNISTERI: Well they said they'd run search
15 terms on relevant accounts. I don't even know what relevant
16 accounts means. If that's custodians, then that's fine.

17 MR. LYNCH: Yes, sorry --

18 MR. MUNISTERI: Okay.

19 MR. LYNCH: -- for the confusion.

20 THE COURT: All right.

21 MR. LYNCH: We'll search the right people.

22 THE COURT: What else?

23 MR. MUNISTERI: And 51, Your Honor, is basically
24 the reports regarding the number of --

25 THE COURT: They said they're going to produce

1 this.

2 MR. MUNISTERI: And I don't know what they mean by
3 a summary report. There should be more than just a summary
4 report regarding what they scraped.

5 MR. LYNCH: I think this is subsumed within 26 as
6 well. That's --

7 MR. MUNISTERI: I agree.

8 MR. LYNCH: So I don't --

9 THE COURT: Okay.

10 MR. LYNCH: I mean, I don't know what
11 communications necessarily means, but I think no matter what
12 it means it should be subsumed within 26.

13 MR. MUNISTERI: I mean a communication is a
14 communication. It's an email from Prince, you know, to his
15 co-workers saying we got 100,000 today or we got a million
16 today.

17 MR. LYNCH: Right.

18 MR. MUNISTERI: And that's what a communication
19 is.

20 MR. LYNCH: And that will be subsumed -- that will
21 be produced.

22 THE COURT: Okay.

23 MR. MUNISTERI: Okay.

24 THE COURT: What else?

25 MR. MUNISTERI: Then on 54, I didn't understand

1 their response --

2 MR. LYNCH: It was --

3 MR. MUNISTERI: It looked like it was a mistake.

4 MR. LYNCH: It was. That goes to, I believe, it's
5 54, 55, 56, 57. I think what's really being asked for here
6 is a very strange thing called "Confluence Timelines."

7 It's basically where the company -- it's a system
8 called "Confluence" where they put subject matter specific
9 information. Like a filing system --- a confluence.

10 THE COURT: Right.

11 MR. LYNCH: And so at the time -- talk about the
12 depositions -- and the confluence timeline is basically the
13 report of the things that went in to it.

14 THE COURT: I thought you were producing those.

15 MR. LYNCH: We do -- yes. And there was a mistake
16 on the cut and paste on 54 response. And so we are going to
17 produce the confluence timelines, which I think subsumes 54
18 through 57. So same answer to those.

19 THE COURT: Okay.

20 MR. MUNISTERI: I think the only issue on -- so
21 just so there's clarity on the Record with respect to the
22 timelines, there was time when they said they would only
23 produce the one timeline. If there were more than one
24 timeline, we ask that those be produced.

25 I understand from Counsel's comment they'll be

1 produced, but I'm -- I want to be clear on the Record.

2 MR. LYNCH: I don't know how many timelines there
3 are. I know that when it was asked for before, there was a
4 timeline that was identified.

5 THE COURT: All right, well --

6 MR. LYNCH: And I will ask again if there's any
7 other related timelines.

8 THE COURT: And if there's some dispute, come back
9 on relevance.

10 MR. LYNCH: I doubt it.

11 THE COURT: All right.

12 MR. MUNISTERI: I think the only issue on 71 and
13 122 is the timeframe. And when Mr. Lynch and I spoke last
14 week, I told him 14, 15, and 16 was fine. And that, I
15 think, is the only issue.

16 THE COURT: Okay.

17 MR. LYNCH: Well, -- so what are we -- remind me
18 the number again. I'm sorry.

19 MR. MUNISTERI: Seventy-one and 122.

20 MR. LYNCH: Yes, --

21 THE COURT: Right now. Yeah you were going to
22 search from January 14 to mid-16.

23 MR. LYNCH: Right because mid-16 is when this
24 lawsuit was filed, which is -- everybody's testified that's
25 when the scraping stopped. So there's no reason for me --

1 this was putting a reasonable timeline. I mean it's--

2 MR. MUNISTERI: Oh no, the scraping of our website
3 did not stop on '16.

4 THE COURT: True or not true?

5 MR. LYNCH: All I know is what the people
6 testified to.

7 THE COURT: What's your evidence of that?

8 MR. MUNISTERI: My understanding -- and it's
9 principally in connection with essentially preparing our
10 damages expert report on our counterclaim, is that the
11 wheel -- the ability to essentially stop the scrapping ended
12 right after the corporate representative depositions, which
13 was April of '17.

14 THE COURT: Ability to scrap and actual scraping
15 are two different things, so --

16 MR. MUNISTERI: No, no ability to stop. Ability
17 to preclude scraping.

18 THE COURT: But what evidence do you have that
19 after June until they couldn't do it any more, they actually
20 did it? That's what I'm hearing.

21 MR. MUNISTERI: I think there is evidence. I've
22 not gone back and studied that so I can't give the Court a
23 direct --

24 THE COURT: All right

25 MR. MUNISTERI: -- but my memory is, is that it

1 was -- it was after -- and in fact, I explained this to
2 Mr. Lynch last week -- it was after the April 2017
3 depositions that I understood the scraping stopped.

4 THE COURT: So, right now the deadline is June --
5 mid-June of '14 unless he shows you that it was scrapped
6 after that time.

7 MR. LYNCH: Understood.

8 MR. MUNISTERI: Sixteen.

9 THE COURT: Sixteen. Sixteen, yeah.

10 MR. LYNCH: Understood.

11 MR. MUNISTERI: Now I'm not going to be able to
12 show this definitively as he can. If he can confirm -- if
13 the Plaintiff's can confirm -- the counter-Defendants can
14 confirm -- that there was no scraping after June '16, I'm
15 fine with that.

16 THE COURT: Yeah, just be -- yeah, confirm that --

17 MR. MUNISTERI: And I'll look into what I have,
18 Your Honor.

19 THE COURT: Yeah, just because they could get in
20 doesn't mean they did.

21 MR. LYNCH: Right, I'll re-ask the question. It's
22 been asked.

23 THE COURT: Okay.

24 MR. MUNISTERI: The next group, which is 74, 76,
25 78, 80 and 83 is basically board minutes and audit committee

1 minutes. We've restricted scope. I think the only issue
2 are whether the objections -- relevance, privilege and
3 vague -- are being withdrawn.

4 MR. LYNCH: And more importantly, I believe our
5 Counsel had already agreed. And I'm going to always honor
6 prior counsel's agreements. And so he attached a letter
7 from Mr. Jacobs in reply.

8 I wasn't aware of that letter. Apparently they
9 had come to an agreement. So all I need is certainty on
10 what the clarification was of the request and we will
11 comply.

12 So if there was a statement in the letter and even
13 now that there is some clarification of the request,
14 modification of the request --

15 THE COURT: Okay.

16 MR. LYNCH: -- happy to comply with it. Just need
17 to see what that clarification is. Do you remember what the
18 clarification is?

19 MR. MUNISTERI: I don't remember exactly. It was
20 conceptually. I don't need to see all the minutes. I just
21 want to see anything that's related to David Kent, OilPro or
22 the subject matter of this lawsuit or the scraping if such
23 matter --

24 THE COURT: The subject matter of the lawsuit
25 might be attorney/client privilege.

1 MR. LYNCH: But on those we would not -- we would
2 withhold that.

3 THE COURT: Right.

4 MR. LYNCH: But I understand what he's requesting
5 then.

6 THE COURT: All right, now next Mr. Munisteri?

7 MR. MUNISTERI: I think the only issue on 94 is
8 whether to limit, as the Plaintiff's want to impose
9 limitations, only published business models.

10 And if we were talking about only published
11 information, I would get that publicly. So what we've asked
12 for is we've asked for basically the business models and
13 stated goals for Rigzone and Dice open web, period, whether
14 published or internal.

15 And it's the internal documents that I'm really
16 seeking.

17 THE COURT: So what do you think that would be?
18 Projections? I'm not sure what you're talking about. A
19 business model is different from a projection in my view.

20 MR. MUNISTERI: So, I mean, a stated goal would be
21 earnings, number of members. It could be a business model.
22 It could be an internal business plan.

23 THE COURT: All right, Mr. Lynch?

24 MR. LYNCH: Okay, with that clarification, I at
25 least understand it because before the goal could be we're

1 going to have better food in the break room.

2 THE COURT: Right.

3 MR. LYNCH: I mean, I didn't know what it meant.

4 THE COURT: All right. So, you need to turn over
5 published or non-published business models or business goals
6 and that goes through the time you're using to -- well,
7 let's just take it through the end of '16. All right?

8 MR. LYNCH: And some of the examples of those were
9 described -- and I don't have a transcript -- of those kinds
10 of things. And I get a more a refined sense of that I think
11 I can move forward with that.

12 MR. MUNISTERI: A business matrix, not --

13 MR. LYNCH: Right.

14 MR. MUNISTERI: -- material.

15 THE COURT: Obviously. What else, Mr. Munisteri?

16 MR. MUNISTERI: So the next are communications
17 between the parties. The Plaintiff's objections is well we
18 have those communications. And we may have some or all of
19 those communications. But I don't have an operating
20 company.

21 We responded to their similar request which was
22 identical and produced whatever we did have that went back
23 and forth. There shouldn't be a lot. It shouldn't even be
24 a burdensome operation because you're talking about
25 communications that took place between two competitors.

1 So I don't even understand what reason for their
2 objection if they think it's burdensome.

3 THE COURT: Well they think that they've already
4 produced it.

5 MR. MUNISTERI: And if they did, then that's fine.
6 But that's not my understanding of their objection.

7 MR. LYNCH: I don't know that we've already
8 produced it. I do think that they should already have it.
9 If he's telling me that they don't have it because they've
10 lost computers or don't have access to the same emails or
11 for some reason, then he can say that. But I think
12 otherwise it's just as easy for him to grab --

13 THE COURT: Right.

14 MR. LYNCH: -- communications --

15 MR. MUNISTERI: No, I am saying that and I said
16 that to him last week which is we had computer servers that
17 were physically taken, have gone through a certain chain of
18 custody, are not operating today.

19 Now, I've been through this, so I have said it and
20 I have explained it to Plaintiff's Counsel.

21 THE COURT: All right, so run what you've got.

22 MR. LYNCH: Understood.

23 MR. MUNISTERI: 121 I think is the request that
24 Your Honor was referring to at the beginning of this. And
25 it is in essence trying to capture the communications that

1 refer to Mr. Kent's OilPro. There shouldn't be a lot of
2 communications within one company after he left -- three
3 years after he left.

4 The same request was directed to us. We spent the
5 required efforts to go through and do the searches and
6 produced anything that mentioned Rigzone. And that's the
7 same request sent back to them.

8 And this is for the time period where Mr. Kent's
9 not involved or OilPro -- OilPro's always a competitor. So
10 it's for a time period when there shouldn't really be a lot
11 of communications.

12 But to the extent there are, so the Court knows
13 this, general communications that have described OilPro have
14 been very important to the case. They often are
15 communications to customers that produced -- and I'm giving
16 just an antidotal example -- that compares the two companies
17 and shows why they are so different.

18 And so any comparisons, any communications about
19 OilPro. It's an easy search to run. And if the issue is
20 the number of custodians, I'm happy to, you know, on
21 limiting the number of custodians because neither of these
22 companies was very big. OilPro very small. Rigzone,
23 relatively small.

24 MR. LYNCH: Partly this is duplicative of other
25 requests. I think it is assumed with some of them;

1 otherwise it's just a catch-all.

2 THE COURT: All right. Limit it to no more than
3 10 custodians and the relevant timeframe predates this
4 lawsuit. So we don't capture privileged documents that
5 we've got to sort through.

6 MR. LYNCH: Understood, Your Honor.

7 MR. MUNISTERI: The last item on the request I
8 think we have agreed to. We had Plaintiff's Counsel and I
9 had a discussion last week trying to resolve these. I think
10 I threw out the number 10, but I told them I didn't know
11 what the prior agreement was.

12 It turns out there was a prior agreement that we
13 had with the preceding Counsel and was to limit the request
14 on 123, 126, 48 and 52 to five entities that we would choose
15 from the list.

16 THE COURT: Okay. Then that's resolved.

17 MR. MUNISTERI: Then the one last issue is the
18 interrogatory answer. And let me first give --

19 MR. LYNCH: Let me --

20 THE COURT: You were going to answer?

21 MR. LYNCH: Yes.

22 THE COURT: Okay. He's going to answer.

23 MR. LYNCH: I ask better questions.

24 THE COURT: Okay. All right.

25 MR. MUNISTERI: The context is the key factual

1 issue in the damage analysis are the number of members that
2 Rigzone had at different times. We just asked the question
3 and really, Your Honor, we sent the interrogatory -- one
4 interrogatory because solely of the damage expert report.

5 We're just asking the --

6 THE COURT: So why isn't the information that
7 they've referred to, why do they have to do something else?

8 MR. MUNISTERI: Because the documents don't answer
9 the question. And Plaintiff's Counsel admitted and
10 frequently spoke that if the documents they referenced do
11 not answer the question, then an interrogatory is actually
12 appropriate.

13 THE COURT: So, can you get this information
14 through a document or is this --

15 MR. LYNCH: No it's not through a document. It's
16 through other work. And it's still the big if. I don't
17 know -- other people think that it is answerable based on
18 the documents. I have not --

19 THE COURT: Okay.

20 MR. LYNCH: -- I haven't looked at all of them to
21 determine whether or not I can figure it out. Other people
22 thought it could be. I've gone further than that and have
23 asked somebody else, you know, what the burden is to do
24 this. I was told it was something that it would probably
25 take them two hours to do and I said well then do it.

1 THE COURT: Do it, all right.

2 MR. LYNCH: All right, because I'm tired of the
3 fighting.

4 THE COURT: Okay. Super. So you'll get that?

5 MR. LYNCH: Yes, Your Honor.

6 MR. MUNISTERI: Two issues that are apart from the
7 pending motion that I wanted to raise. One, I've raised
8 with Mr. Lynch. One I've literally thought of on the way
9 over here.

10 The first is the schedule order. We spoke last
11 week about the amendments and tried to come up with an
12 agreed timeframe based on when the Plaintiffs believe
13 they'll be able to produce whatever documents the Court
14 orders today.

15 And the Plaintiffs have said they're going to
16 aggressively produce these documents quickly. I will
17 reciprocate and get the depositions scheduled very quickly.
18 I think both sides, Your Honor, are very motivated to keep
19 the number of depositions to a minimum and to get them done
20 quickly.

21 From my perspective, what I want to make sure I do
22 so that my client is properly defended, is make sure that I
23 get the documents, have enough time -- you know, not a
24 week -- but a proper amount of time to be prepared for the
25 depositions.

1 And so we do need a new Scheduling Order. I
2 talked about it with the prior Counsel, Mr. Jacobs. We
3 never reached a full agreement, but we both agreed and the
4 Court agreed and at the last hearing that deadlines need to
5 be bumped.

6 That's the main issue.

7 THE COURT: Can you agree on something and submit
8 it?

9 MR. MUNISTERI: It seems like we both want to get
10 to trial first, but I'm concerned about -- or get to trial
11 as soon as we can -- but I'm very concerned about picking a
12 schedule that's not realistic.

13 And so I think when we went through it, my memory
14 is just thinking out loud of our conversation, sort of
15 looking at the number of depositions, time of year, just
16 history, you know, I came up with sort of late August.

17 And I said, look, if we took a very aggressive
18 position, I think we could finish the depositions by
19 August 1. But I don't -- but that's a compromise.

20 And so that's where we ended up. I understood
21 that Mr. Lynch was going to propose a schedule and I've not
22 received it or if he did send it, I'm not seeing it.

23 THE COURT: Okay.

24 MR. LYNCH: No, that -- I'm sorry you
25 misunderstood. That was not what -- I said I was going to

1 look into it and try to figure it out, and I have. And
2 based on these request and based on the works that -- these
3 requests are already being worked on.

4 THE COURT: Okay.

5 MR. LYNCH: Because we've already agreed to some.

6 THE COURT: Okay, great.

7 MR. LYNCH: It's happening. And I think that we
8 should be able to produce the documents by April 6th.

9 THE COURT: Okay.

10 MR. LYNCH: Okay and so when we do that -- and my
11 feeling is well that'll give them a month to look through
12 the documents and then a month to do the depositions and we
13 could be done by June 8th.

14 And I am efficient. I am aggressive. I want to
15 get this done. We need to get to the finish line. This has
16 been around too long. And the only way to do that really is
17 to have a real deadline that we really focus on.

18 THE COURT: How many depositions? Do you need any
19 more depositions?

20 MR. LYNCH: I think we probably will end up
21 needing to take their experts and maybe three or four
22 others. So we were talking between us a total of about
23 eight depositions.

24 MR. MUNISTERI: Well if it's three or four others
25 plus experts, that's seven, eight.

1 MR. LYNCH: Well, --

2 MR. MUNISTERI: And then I have the same on my
3 side. So we're really talking with experts, 14 to 16. I
4 have never come close to 14, 16 depositions in a commercial
5 case in four weeks. And I --

6 THE COURT: Four weeks is overly optimistic.
7 So -- but I think 60 days is something to work toward. So
8 if you bump out April 6 and get things done by July 6th.

9 MR. MUNISTERI: August.

10 THE COURT: No, you'll have --

11 MR. MUNISTERI: If we have until August 1st.

12 THE COURT: So you're going to get the documents
13 by April 6th. You've got one month -- you want to look at
14 them for a month.

15 MR. MUNISTERI: Two months for depositions.

16 THE COURT: All right, August 1st.

17 MR. MUNISTERI: Here's the last issue, Your Honor.
18 And I have not raised this with Plaintiff's Counsel, so I --
19 but I'm trying to think of ways -- I think both parties have
20 tried to settle the case. We're far apart.

21 I don't know that this is an impediment, but I do
22 think that the large elephant in the room is whether the
23 \$3.3 million that has already been paid as a credit will be
24 an offset.

25 THE COURT: Of course it will.

1 MR. MUNISTERI: We've looked at it.

2 THE COURT: Why not?

3 MR. LYNCH: Well I don't -- without any further
4 looking at it I think we looked at it too and we believe it
5 would be as well.

6 THE COURT: Yeah, it's restitution.

7 MR. MUNISTERI: Okay, fair enough then. If that's
8 their position then I'll --

9 THE COURT: I mean, if you've got some argument
10 that it isn't, but the point is, I don't know -- I mean,
11 it's criminal restitution for this very conduct. To me
12 that's an offset.

13 Now if you've got some great case that says no, no
14 that's criminal restitution. But it's not a fine, it's
15 restitution.

16 MR. LYNCH: Right, no I'm not --

17 THE COURT: So make your argument, file a motion,
18 but I think it's offset.

19 MR. LYNCH: And I'm not arguing with you.

20 MR. MUNISTERI: If we're agreed then I'm -- no
21 need for me to raise that.

22 MR. LYNCH: You're right, I mean there's more --

23 MR. MUNISTERI: Thank you, Your Honor.

24 MR. LYNCH: We still have a couple other -- at
25 least one other little issue. But just to -- I mean, this

1 isn't just a compensatory damages case. This is a punitive
2 damages case. And so there is some bad conduct here that I
3 think --

4 THE COURT: Okay.

5 MR. LYNCH: -- the jury is going to be permitted
6 to take a look at and see if some of the things were done
7 with malice.

8 THE COURT: If you've got -- yeah, well Judge
9 Miller will be making that determination.

10 MR. LYNCH: Understood. One other thing that was
11 in the Scheduling Order that was never officially done,
12 there was a rebuttal expert deadline of February 23rd.

13 And so that -- they missed it. And I understand
14 that you're just going to be inclined to give them a relief,
15 but they missed it.

16 And they didn't get anything official --

17 THE COURT: No, I mean. No, we're not -- we're
18 just extending -- you've got the experts you want, right?

19 MR. MUNISTERI: Right and if the Court remembers,
20 we had this discussion at the last hearing which was we
21 wanted to take the depositions of their experts before our
22 rebuttal expert report was due. And they said they wanted
23 the ability to supplement.

24 And so Your Honor said that February 23 date was
25 off and we come up with a new date and left it with me and

1 Mr. Jacobs to present the new dates. But that Mr. Jacobs
2 will be given an opportunity to supplement his damages
3 report.

4 So the notion that we missed the deadline is just
5 not wrong. And look, I understand --

6 THE COURT: This is just supplementing expert
7 reports?

8 MR. MUNISTERI: No, this is rebuttal experts --

9 THE COURT: Oh, rebuttal expert.

10 MR. MUNISTERI: And so the Court's instruction was
11 the February 23 date is off. Come up with a new Scheduling
12 Order -- which we just talked about.

13 We, meaning the OilPro, David Kent parties, can
14 depose their damage experts first before the rebuttal expert
15 deadline, but the Plaintiff would get an opportunity to
16 supplement their expert reports. And I was fine with that.

17 MR. LYNCH: I know I'm new to the case, but that
18 wasn't exactly the agreement. The agreement -- the
19 instruction was come up with a date and get it scheduled.
20 That never happened. It was a date that was important to
21 them. They should have done it.

22 I understand that you're going to give them relief
23 from this.

24 THE COURT: I am.

25 MR. LYNCH: I full well expect.

1 THE COURT: I am. But this is something when you
2 get, you know, from now until August 1st, you work on -- I
3 mean, get the experts taken care of -- they're, of course,
4 most difficult. And figure out when you're going to do it,
5 when your supplemental reports are due. You've got enough
6 time within the timeframe I've just given you to get this
7 all worked out on supplementing experts' reports.

8 Obviously it needs to be done before they are
9 deposed, right? So, anything else?

10 MR. MUNISTERI: No, Your Honor.

11 MR. LYNCH: Nothing.

12 THE COURT: You-all have a good day.

13 MR. MUNISTERI: Thank you, Judge.

14 MR. LYNCH: Thank you, Judge.

15 (Proceeding adjourned at 11:52 a.m.)

16 * * * * *

17 I certify that the foregoing is a correct
18 transcript to the best of my ability produced from the
19 electronic sound recording of the proceedings in the above-
20 entitled matter.

21 /S/ MARY D. HENRY

22 CERTIFIED BY THE AMERICAN ASSOCIATION OF

23 ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337

24 JUDICIAL TRANSCRIBERS OF TEXAS, LLC

25 JTT TRANSCRIPT #58400

DATE FILED: APRIL 2, 2018